

COMPUTER CRIME LAW

Orin S. Kerr

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To my father, the original Professor Kerr

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Preface

This book is designed to fill a gap in the modern law school curriculum. Traditional course offerings in criminal law and procedure largely ignore computer crimes. This was understandable a few years ago, when computer crime law was an esoteric specialty. Today, however, computer crime law is emerging as an important area of criminal law practice. A growing number of prosecutors and defense attorneys find themselves working with legal questions unique to digital crimes. The existing curriculum does not cover these topics, except perhaps for brief mention in a “cyberlaw” survey course. This book attempts to correct that situation by offering comprehensive coverage of the new field, assembled together in one place for the first time.

The materials are organized around three questions. First, what conduct involving a computer is prohibited by the criminal law? Second, what legal rules govern the collection of digital evidence in criminal investigations? Third, what powers do state, national, and foreign governments have to investigate and prosecute computer crimes? The first question looks at the substantive law of computer crimes, and is addressed in Chapters 2, 3, and 4. The second question examines the law of criminal procedure for digital evidence, and is covered in Chapters 5 and 6. The third question considers the role of jurisdiction and sovereignty in a world of global online crime, and is addressed in Chapters 7 and 8.

Although the materials are intended primarily for classroom use, my hope is that they will reach a broader audience. First, the materials should be helpful to criminal law practitioners. Computer crime law lacks a treatise that summarizes the field and explains how the pieces fit together. In light of that, I have made special efforts to explain basic doctrine in a way that practitioners should find useful. The law remains complex and sometimes uncertain, and this book makes no effort to pretend otherwise. At the same time, I hope these materials will serve as a reference work for prosecutors and defense attorneys in need of a primer on existing law.

The book also should be a useful resource for scholars. Computer crime law is new and evolving, and many issues remain open. Surprisingly little has been written about the major issues in the field. My hope is that the framework introduced in this book will help encourage and direct future scholarly efforts. To that end, the extensive commentary in these materials attempts both to review existing scholarship and to ask important questions for scholars to answer.

The materials in this book are best suited for classroom use in a one-semester course offered to upper-level law students, either as a three-credit class or a two-credit seminar. I assume that readers have some

experience with basic criminal law, such as a first-year law school survey course. On the other hand, I do not assume that readers are familiar with the law of criminal procedure. In addition, I assume that readers have no special background with computers. Students with advanced knowledge of computers or criminal procedure will have a slight advantage understanding a few concepts, but the advantages on the whole are modest. In any event, no such background is assumed or required.

This project began with materials assembled for a computer crime seminar in the Fall 2000 semester, and I have many people to thank for their help during the six-year road to publication. Mark Eckenwiler, Erica Hashimoto, Mike Levy, Paul Ohm, Rick Salgado, and Peter Winn provided feedback on drafts and chapters. GW Law students Noah Falk '05, Kemp Brinson '04, and Tejbir Singh '03 collected materials during in the early stages of the project. In the last year, a small army of GW Law students helped me with formatting, citechecking, and editing: David Luden (who did a great deal of the work), Melissa Colangelo, Mark Knights, Sharmili Hazra, David Kim, Jennifer Best, Adam Schwartz, Erika Ban, Adele Ho, Alejandra Perez, Merel Berling, Claire Ogilvie, and Matt Benz. Dean Fred Lawrence provided resources and welcome encouragement. Finally, I am particularly grateful to my former colleagues at the Computer Crime and Intellectual Property Section (CCIPS) of the United States Department of Justice. This book covers issues I first encountered as an attorney at CCIPS from 1998 to 2001, and I could not have written it without the benefit of many illuminating discussions at CCIPS during that period. I am especially indebted to my friend Mark Eckenwiler, who patiently answered countless questions when I was new to the field.

To improve the readability of the materials, I have taken the liberty of removing citations, deleting unrelated portions of opinions, and otherwise streamlining the cases without necessarily indicating that the original material has been altered. Readers in need of greater precision should always consult the original sources.

ORIN KERR
WASHINGTON, DC

September 2006

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